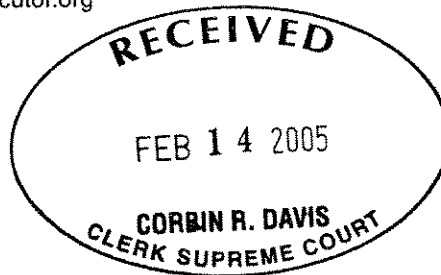




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February 10, 2005

Michigan Supreme Court
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Lansing, MI 48909

RE: 2003-62 - Proposed Adoption of New Michigan Rules of Professional Conduct

On behalf of the Prosecuting Attorneys Association of Michigan, I am writing to inform the Court of our concerns with the proposed new rules of professional conduct.

1. **MRPC 1.2(a)** provides...*In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to the plea to be entered, whether to waive jury trial and whether the client will testify.*

Either the rule or the commentary should reflect that because the decision to accept or reject the plea offer belongs to the client, the lawyer must present all plea offers to the client.

2. **MRPC 1.7(b)(3)** governs representation of multiple defendants before the same tribunal. The commentary states: *The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant.*

We agree that the potential for conflict of interest is grave, and would recommend that the representation of co-defendants be prohibited. We would also recommend that the rule prohibit a lawyer from representing both the defendant and the victim in a criminal case. Unfortunately, we are experiencing cases where the defendant in a domestic violence case uses his position of power and control over the victim to obtain her "consent" to be represented by the defendant's attorney. The defendant's attorney then advises the victim client to take the 5th amendment rather than testify against the attorney's defendant client, precluding a prosecution intended to protect the victim.

3. **MRPC 1.11** governs conflicts when a person moves from private practice to government practice, and vice versa.

We would recommend that the rule or commentary be amended to specify that the movement from private practice to the position of elected prosecutor does not disqualify the entire office from prosecuting cases the newly elected prosecutor previously handled, so long as the new prosecutor refrains from participating in cases involving his or her former clients. See *People v Doyle*, 159 Mich App 632 which requires disqualification of the entire prosecutors office if the prosecutor has a conflict.

This proposed amendment would change *Doyle* only in the circumstance where a newly elected prosecutor is transitioning from private practice to the prosecutor's office. Appointing special prosecutors in cases where a "Chinese Wall" can effectively be raised is unnecessary and expensive.

4. **MRPC 1.13(e)** states: *A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7.* Yet the commentary indicates that (e) applies to the representation of a **principal** officer or **major** shareholder.

This rule is too broad and contradicts the commentary; the GM lawyer can represent any GM employee, shareholder, etc and preclude cooperation in a criminal investigation. The rule should be rewritten to cover only directors, principal officers, or major shareholders so it conforms to the commentary. Didn't we learn anything from Enron?

5. **MRPC 3.3** prohibits a lawyer from *knowingly* offering false evidence, and then allows a lawyer to refuse to offer evidence that the lawyer *reasonably believes to be false*.

Why should a lawyer be able to offer evidence he or she **reasonably believes to be false**. Why isn't a reasonable belief in its falsity sufficient to make it a violation to present the evidence. If trials are about the truth, we shouldn't sanction deception and allow lawyers to present false evidence while hiding behind a claim that they lacked absolute knowledge that it was false. The rule should preclude lawyers from knowingly offering false evidence, and from offering evidence the lawyer reasonably believes to be false.

6. **MRPC 3.4(b)** prohibits counsel from assisting a witness to testify falsely.

We believe the standard for lawyers should be higher than subornation of perjury. A lawyer should be prohibited from knowingly assisting a witness to testify falsely, or from assisting a witness the lawyer reasonably believes will testify falsely.

7. **MRPC 3.4(f)** prohibits counsel from requesting another person to refrain from voluntarily giving relevant information to another party *unless the person is a relative, employee or other agent of a client*.

Why should there be an exception for relatives, employees and agents. Why should GM's counsel be able to counsel a factory worker not to talk to an OSHA inspector? Why should a domestic violence defendant's lawyer be able to keep the spouse, children, parents etc of the defendant from providing relevant information. This rule should be a blanket prohibition, regardless of the witness' relation to the client.

8. **MRPC 3.5** prohibits a lawyer from engaging in *conduct intended to disrupt the tribunal*. It used to prohibit *undignified or discourteous conduct toward the tribunal*.

So undignified or discourteous conduct that is not intended to disrupt the tribunal is now acceptable? We propose that the rule should hold the lawyer accountable for his or her conduct, and that his or her conduct is the best evidence of his or her intent. The rule should simply prohibit conduct that either disrupts the tribunal, or that is discourteous conduct toward the tribunal, opposing counsel, witnesses or jurors, without a specific intent requirement.

9. **MRPC 3.8** on the special responsibilities of a prosecutor is unchanged. It continues the fiction that we are responsible for preventing investigators, police officers or other persons associated with the prosecution from making a statement prohibited under rule 3.6.

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The commentary recognizes that we cannot be held responsible for individuals we do not control, so why continue this provision that holds our careers liable for another person's exercise of their 1st amendment rights. We propose that 3.8(e) be eliminated, or at the very least, modified to only apply to prosecution employees.

10. **MRPC 4.2** contains two versions. We support the revised version which excepts application of the rule to governmental lawyers engaged in investigating or prosecuting civil or criminal violations of the law.

Thank you for your consideration, and please contact me if you have any questions.

Sincerely,



Stuart J. Dunning III
President

cc: Justices of the Supreme Court
PAAM Officers